Supreme Court, U.S.
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In The

Supreme Court of the United States

JACQUELINE TURNER, on behalf of herself and all others similarly situated,

Petitioner,

v.

BENEFICIAL CORPORATION, BENEFICIAL NATIONAL BANK, USA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JACQUELINE TURNER, et al., Plaintiffs, v. BENEFICIAL CORPORATION and BENEFICIAL NATIONAL BANK, USA, Defendants.	)	CIVIL ACTION NO. 95-A-1212-N (Filed Jul. 27, 1999)

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Before the court is a Motion for Class Certification filed by the Plaintiff on May 14, 1999. The Plaintiff, Jacqueline Turner, originally filed her Complaint in this case on September 15, 1995. She filed an Amended Complaint on January 22, 1998. Turner alleges that Defendants Beneficial Corporation and Beneficial National Bank, USA (collectively "Beneficial") engaged in "unfair and deceptive practices in connection with the financing of satellite dishes and other durable goods costing $2,000 or more." Am. Compl. ¶ 1. More specifically, Turner contends that the Defendants deprived unsophisticated consumers of relevant information to which they were entitled under the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* ("TILA").

The Plaintiff brings three counts on behalf of herself and those similarly situated. In Count I of the Amended

Complaint, Ms. Turner asserts that Beneficial violated provisions of the TILA "[b]y employing open-end credit disclosures with respect to transactions not legitimately classifiable as open-end." Am. Compl. ¶ 49. She requests judgment in favor of the plaintiff and the class awarding statutory damages, actual damages, attorney's fees and litigation expenses, and other costs. *See id.* ¶ 51. In Count II, Ms. Turner contends that, by issuing its private label credit cards to disguise closed-end credit transactions as open-end credit transactions, Beneficial implemented a scheme to defraud through a pattern of mail and wire fraud in violation of RICO. *Id.* ¶¶ 56, 57. In Count III, Ms. Turner accuses Beneficial of Fraud by Suppression under Alabama law in failing to disclose the nature of the credit for which plaintiffs and class members applied, the cost of the credit, and other information required for closed-end transactions. *Id.* ¶¶ 63-65.

For the two federal claims, Ms. Turner seeks certification of a nationwide class consisting of those persons satisfying the following criteria:

> a. They entered into a consumer credit transaction with a merchant whose business was the selling of "non-recurring sale items" which was financed by Beneficial Corporation and/or Beneficial National Bank, USA.
>
> b. The line of credit authorized in the transaction was set at an amount no more than $300 more than the amount of the cost of the transaction.
>
> c. The transactions occurred within (i) one year prior to the filing of this complaint for purposes

> of the TILA claim, (ii) and, four years for the purposes of RICO.

Motion for Class Certification (File Doc. 87) ¶ 1. For the fraud by suppression claim, Turner seeks certification of an Alabama subclass consisting of persons whose transactions occurred within two years prior to filing of this complaint. *See id.*

For reasons to be discussed, Plaintiff's Motion for Class Certification is due to be DENIED in part.

II. STANDARD FOR CLASS CERTIFICATION

The question of class certification is a procedural one distinct from the merits of the action. *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980).[1] In deciding whether to certify a class, a district court has broad discretion. *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566 (11th Cir. 1992). Although a district court is not to determine the merits of a case at the certification stage, sometimes "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Washington*, 959 F.2d at 1560 n.11.

A class action may only be certified if the court is satisfied, after a rigorous analysis, that the prerequisites of Federal Rule of Civil Procedure 23 have been satisfied. *Gilchrist v. Bolger*, 733 F.2d 1551, 1555 (11th Cir. 1984). "A class action may be maintained only when it satisfies all the requirements of Fed. R. of Civ. Pro. 23(a) and at least

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[1] In *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent the decisions of the former Fifth Circuit.

one of the alternative requirements of Rule 23(b)." *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997). A court must evaluate whether the four requirements of Rule 23(a) are met: numerosity, commonality, typicality, and adequacy of representation. Furthermore, the court must determine whether the action may be maintained as one of the classes under Rule 23(b). The party seeking to maintain the class action bears the burden of demonstrating that all prerequisites to class certification have been satisfied. *Walker v. Jim Dandy Co.*, 747 F.2d 1360, 1363 (11th Cir. 1984).

III. FACTS

The submission of the parties establish the following facts:

Jacqueline Turner is a resident of Union Springs, Alabama. On or about February 9, 1995, Ms. Turner responded to an advertisement in the Union Springs Herald placed by Star Vision, Inc. for the purpose of soliciting satellite system sales.[2] Ms. Turner decided to purchase a satellite system, and she gave credit application information over the phone. An employee of Star Vision installed a satellite dish at Ms. Turner's home on or about February 9, 1995. An invoice from Star Vision indicated a total price of $3,224.00 with a notation of "$48.36/month." Turner contends that she was informed

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[2] Star Vision, Inc. was originally named as a defendant in this case. The court dismissed the claims against Star Vision without prejudice after receiving notice that Star Vision had filed for bankruptcy.

she would have to pay $39.95 per month, but she was required to pay $48 per month. Turner Dep. at 63-64.

Subsequently, Ms. Turner received an "Excel" card. The "Excel" card which Ms. Turner received was a private label credit card issued by Beneficial, pursuant to an agreement between Beneficial and Star Vision. The card could only be used to purchase goods and services from Star Vision. Ms. Turner contends that she was not provided any information which would lead her to believe that she had applied for a credit card. Ms. Turner began receiving monthly bills from Defendant Beneficial requiring a minimum payment of approximately $50.00.

The Cardholder Agreement and Disclosure Statement for the "Excel" card contains TILA disclosures applicable to "open end" credit transactions. Ms. Turner contends that Beneficial should have disclosed the following items of information required to be disclosed in closed-end credit transactions: (1) the number of payments; (2) the amount of each monthly payment; (3) the amount financed; (4) the total finance charge; (5) the total of payments; and (6) the total sales price. In deposition testimony, Turner stated that she had never read the cardholder agreement or disclosure statement. Turner Dep. at 38-39. Ms. Turner alleges that she and other class members relied on the disclosures to their detriment in that they were not given accurate costs of financing, they were denied the opportunity to accurately compare terms of financing, they were prevented from entering a more favorable financing arrangement, and they paid more for the satellite system under open-end credit than they would have paid under closed-end credit. Am. Compl. ¶¶ 50, 61, 67.

IV. DISCUSSION

Federal Rule of Civil Procedure 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Plaintiff asserts that the class exceeds 1,000 persons, there are common questions of law or fact which predominate over any individual questions, and Ms. Turner will fairly and adequately protect the interests of the class because she has been a victim of the Defendants' unfair and deceptive practices. Ms. Turner identifies the common questions of law as: (1) whether it is a violation of TILA to classify as "open end" credit transactions in the financing of large-ticket durable goods; (2) whether the mailing of form documents in connection with the issuance of financing of said items constitutes mail fraud; (3) whether Beneficial conducted or participated in the conduct of the affairs of an enterprise through a pattern of mail fraud, in violation of 18 U.S.C. § 1962(c); and (4) whether the failure to provide closed end credit disclosures in the circumstances alleged constitutes fraud by suppression under Alabama law.

Central to the Plaintiffs' motion is her contention that proof of detrimental reliance is not an element of her

claims. In a series of recent decisions, this court and other courts in this district have held otherwise. *See Cooks v. American General Financial Center*, No. 95-A-1213-N (M.D. Ala. Jan. 13, 1999); *Ferry v. Household Retail Services, Inc.*, 180 F.R.D. 423 (M.D. Ala. 1998); *Mack v. General Motors Acceptance Corp.*, 169 F.R.D. 671 (M.D. Ala. 1996).

The plaintiffs in both *Cooks* and *Perry* asserted class claims arising from the use of private label credit cards, with TILA disclosures for open-end credit transactions, to finance satellite dish purchases. In *Cooks*, this court adopted Magistrate Judge McPherson's recommendation denying class certification for fraudulent suppression claims under Alabama law. The court found that the named plaintiffs did not satisfy the typicality requirement of Rule 23(a). *See Cooks*, No. 95-A-1213-N (M.D. Ala. Jan. 13, 1999) at 11. The plaintiffs sought to represent a class of persons who relied on the provision of improper credit disclosures, yet the named plaintiffs testified that they relied on representations from a salesperson rather than any disclosures in the documents. *See id.* at 12-14.

Judge McPherson noted that reliance is an element of fraudulent suppression under Alabama law. *See id.* at 7-8 (quoting *Ford New Holland v. Proctor-Russell Tractor Co.*, 630 So. 2d 395, 399 (Ala. 1993)). This court affirmed its earlier ruling when it denied the plaintiffs' motion to reconsider. *See Cooks v. American General Financial Center*, No. 95-A-1213-N (M.D. Ala. Jul. 14, 1999). The plaintiffs asserted that a recent Alabama Supreme Court decision, *Ex Parte Government Employees Ins. Co.*, 729 So. 2d 299 (Ala. 1999), removed the need for a plaintiff to prove reliance in a fraud by suppression claim. This court maintained that "there must be a showing by each plaintiff

that he or she relied upon, or was induced to act by, suppression of a fact in order to prevail on a fraudulent suppression claim." *Cooks v. American General Financial Center*, No. 95-A-1213-N, at 3 (M.D. Ala. Jul. 14, 1999). Furthermore, the court stated, "Separate from any difficulties posed by proving the element of duty to disclose, this court finds, that the factual issues which would be involved in proving the requirement of reliance, or inducement to act, precludes class certification in this case." *Id.*

In *Perry*, Judge DeMent adopted the recommendation of Magistrate Judge Carroll, granting in part and denying in part a motion for class certification. As in the case presently before the court, the plaintiffs sought certification of a nationwide class for federal claims under TILA and RICO, and certification of an Alabama subclass for a state law claim of fraud. The evidence before the court reflected that neither the plaintiff nor his daughter, who was substituted as plaintiff after her father died, relied on the written credit disclosures in the documents at issue. The father died before his deposition could be taken, and the daughter asserted that she had neither seen nor read the Credit Agreement. *See Perry*, 180 F.R.D. at 433.

The court certified a class with respect to the claim for statutory damages under the TILA, but denied certification with respect to the claims for actual damages under the TILA, violation of RICO, and state law fraud. *See id.* at 427, 437. Judge Carroll found that, as to the latter claims, the plaintiffs could not satisfy the typicality and adequacy of representation requirements because they had not relied on the written disclosures at issue. The court noted that a plaintiff claiming actual damages

for violation of the TILA must establish a causal connection between the inaccurate disclosure and his injury "by demonstrating that he relied on the inaccurate disclosure." *Id.* at 433 (quoting *Adiel v. Chase Federal Savings & Loan Ass'n*, 630 F. Supp. 131, 133 (S.D. Fla. 1986), *aff'd*, 810 F.2d 1051 (11th Cir. 1987)).

Similarly, the court noted that when a RICO violation is predicated on mail or wire fraud, "the plaintiff must have been the target of the scheme to defraud and must have relied to his detriment on the misrepresentations made in furtherance of that scheme." *Id.* at 434 (quoting *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir.), *cert. denied*, 502 U.S. 855, 112 S.Ct. 167, 116 L.Ed.2d 131 (1991)). As to the fraud claim, the court noted that reliance is an element of fraud by suppression under Alabama law in that the plaintiff must show the suppression had some effect on his action or inaction. *See id.* at 435.

The plaintiffs in the present case simply rehash arguments which this court and other courts in this district have found unpersuasive. Despite the plaintiffs protestations to the contrary, this court holds that reliance is a necessary element of the Plaintiff's claims for actual damages under the TILA, violation of RICO, and fraud by suppression under Alabama law. A recent Eleventh Circuit case does not, as the Plaintiff suggests, negate the element of reliance for RICO claims predicated on mail or wire fraud. *See All Care Nursing Service, Inc. v. High Tech Staffing Services, Inc.*, 135 F.3d 740, 745 n.10 (11th Cir. 1998) ("Reliance is only an element of a RICO claim to the extent that a RICO plaintiff must prove he was injured by reason of the RICO defendant's deception and fraud.").

Ms. Turner acknowledged in deposition testimony that she did not read the cardholder agreement or disclosure statement containing the allegedly improper disclosures. Therefore, she cannot prove that she relied to her detriment on the written disclosures. Given the factual similarity between Ms. Turner's claims and those of the plaintiffs in *Cooks* and *Perry*, this court chooses to follow the reasoning of those cases. Accordingly, Ms. Turner cannot satisfy the typicality and adequacy of representation requirements in Rule 23(a) for her claims of actual damages under the TILA, violation of RICO, and fraud by suppression under Alabama law. Class certification for those claims is inappropriate.

The only remaining claim to be considered is Turner's claim for statutory damages under the TILA. If Defendants violated the TILA by providing improper disclosures, as alleged by the Plaintiff, they may be held liable for actual and statutory damages. *See* 15 U.S.C. § 1640. In *Perry*, the court certified a class under Rule 23(b)(3) for a claim of TILA statutory damages. The court noted that "the state of mind of the creditor . . . is the focus of a court in determining whether a plan is improperly characterized as open ended." *Perry*, 180 F.R.D. at 432. Thus, to establish a violation of the TILA, a plaintiff need not prove her own reliance on the defendant's conduct. *See id.*

Because the statutory damages inquiry focuses on the defendants' practices rather than the plaintiff's state of mind, in contrast to the actual damages inquiry, class treatment was appropriate. *See id.* The plaintiff was a participant in the scheme which allegedly violated the TILA, which was sufficient to render her an adequate

representative and her father's claim typical for purposes of determining TILA liability. *See id.* at 433. The court found that the plaintiff established the two essential requirements under Rule 23(b)(3)-predominance and superiority. *See id.* at 436. A TILA statutory damages claim focuses simply on whether the disclosures made in the credit card program violate the TILA. Because there was no dispute concerning the content of the disclosures and the disclosures were common to all class members, class questions predominated and the class action was a superior way to determine liability. *See id.*

Like the plaintiff in *Perry*, Ms. Turner was a participant in the Defendants' scheme which she alleges violated the TILA. Thus, she could fairly and adequately represent a class for the purposes of establishing TILA liability and a right to statutory damages. Defendants contend, however, that it paid the maximum allowable statutory damages in settlement of a prior class action premised on the same TILA claim. In August 1997, Beneficial entered into a settlement with a settlement class comprised of all persons in Alabama who bought satellite dishes with credit card financing provided by Beneficial, except those individuals who had a financed purchase reversed or, like Ms. Turner, had filed suit against Beneficial prior to July 11, 1997.

One paragraph in the stipulation of settlement provided as follows:

> 25. **EFFECT OF OPEN END DISCLOSURES.** Plaintiff expressly acknowledges and agrees that the aggregate Class Relief to which Class Members would have been entitled would have been reduced by not less than $500,000 if Beneficial

> had timely provided closed end disclosures to Class Members pursuant to the federal Truth in Lending Act and Regulation Z thereunder. Beneficial denies, however, that it has violated the Truth-in Lending Act.

Defendants' Memorandum in Opposition to Plaintiff's Motion for Class Certification (File Doc.94), Exhibit A, at p. 21 ¶ 25. The trial court gave final approval to the settlement and ordered that consummation proceed as described in the Stipulation. *See Johnson v. Beneficial Nat'l Bank, USA*, No. 97-120 (Cir. Ct. Marengo County, Ala., Nov. 17, 1997), Defendants' Exhibit B. Subsequently, the trial court entered an order enforcing its final judgment, finding that Ms. Turner's prior federal court action did not strip the state court of jurisdiction. *See Johnson v. Beneficial Nat'l Bank, USA*, No. 97-120 (Cir. Ct. Marengo County, Ala., July 6, 1998), Defendants' Exhibit B. The Alabama Supreme Court affirmed the trial court without opinion. *See Beneficial Nat'l Bank, USA v. Johnson*, No. 1971822 (Ala. Mar. 26, 1999), Defendants' Exhibit B.

Defendants assert that the state court settlement precludes any claim for statutory damages under the TILA. With regard to statutory damages, the TILA provides, "[T]he total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor." 15 U.S.C. § 1640(a)(2)(B). Defendants contend that they paid the maximum statutory damages allowed in the state court settlement, and Ms. Turner's class action arises out of the "same failure to comply by the same creditor." Plaintiff, who requests

certification under Rule 23(b)(3), asserts that this court is not bound by the state court order, which certified a settlement class under Rule 23(b)(2).

The court believes that it must determine the viability of Ms. Turner's claim for statutory damages before certifying a class for that claim under Rule 23(b)(3). Defendants' argument concerning the preclusive effect of the state court settlement, however, should be raised in a motion for summary judgment supported by evidence and brief. Accordingly, the court will delay ruling on the certification of a class for the TILA statutory damages claim until the parties have addressed the viability of such a claim through a motion for summary judgment.

V. CONCLUSION

For the reasons stated above, it is hereby ORDERED as follows:

1. Plaintiffs Motion for Class Certification is DENIED with respect to her claims for actual damages under the TILA, violation of RICO, and fraud by suppression under Alabama law.

2. Defendants shall have until August 10, 1999 to file a Motion for Summary Judgment, with accompanying evidence and brief, addressing the viability of Plaintiff's claim for statutory damages under the TILA. Plaintiff shall have until August 24, 1999 to respond. Defendants shall have until August 31, 1999 to reply. The motion will be taken under submission on that day for determination without oral hearing.

DONE this 27th day of July, 1999.

/s/ W. Harold Albritton
W. HAROLD ALBRITTON
CHIEF UNITED STATES
DISTRICT JUDGE